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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 1004

A. C. SUHREN, LYDIA COOK, SUHREN, ET AL.,

Petitioners,

versus

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Granting the Writ	5
Conclusion	13
Appendix A	15
Appendix B	29
Appendix C	35

CITATIONS

Cases:

Alabama v. Texas, 347 U.S. 272 — 13

Edward Hines Yellow Pine Trustees v. Martin, 268 U.S. 458 — 10

Harrison County v. Guice, 244 Miss. 95, 140 Sc 2d 838 (1962) — 5, 6, 7, 8

Humble Oil & Refining Co. v. Sun Oil Company, (5th; 1951) 190 Fed. 2d 191 — 11

Steamboat Magnolia v. Marshall, (1860) 39 Miss. 109 — 9

Moore v. Kuljis, (1967) 207 So.2d 604 — 8

Treuting v. Bridge and Dock Commission, (1967) 199 So.2d 627 — 7

Constitutions:

Mississippi Constitution of 1890, Section 95 — 5

Statutes:

43 U.S.C. 1301 et seq. — 2, 12

43 U.S.C. 1311 — 11

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Petitioners,

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UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the District Court (Appendix C, *infra* pp. 35-53) is reported at 265 F. Supp. 76. The opinions of the Court of Appeals (Appendicies A and B, *infra* pp. 15-28 and 29-33, respectively) are reported at 399 Fed. 2d 485 and on rehearing at 414 Fed. 2d 784.

Jurisdiction

The judgment of the Court of Appeals was entered on the 15th day of August 1968, and on rehearing, on the 7th day of August 1969. By order of Associate Justice Hugo L. Black entered on the 24th day of October, 1969, the time for filing a petition for certiorari was extended

to January 3rd, 1970. The jurisdiction of the court is involved under 28 U. S. C. Sect. 1254 (1).

Questions Presented

I.

The basic question presented is: Whether the century old rule that Federal Courts follow rules of property as established by the highest State Courts where the land is situated may be ignored so as to deprive 2000 owners of their beach front property.

The majority rule followed by the Supreme Court of Mississippi in numerous decisions is that artificial accretions added to fast land by strangers to its title vests in the owner of the fast land.

If permitted to stand the decision of the Fifth Circuit Court of Appeals would establish a new body of Federal Property law in irreconcilable conflict with the property law of the State of Mississippi.

Certiorari should be granted to avoid the uncertainty, injustice and incalculable mischief which would result from such decisions.

II.

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the Submerged Lands Act, 43 U. S. C. 1301 et seq, and the decisions of this court construing the act.

Statement

The history of the events leading to the twenty four miles long sand beach along the shore of Harrison County, Mississippi is contained in the opinion of the District Court. There is no substantial dispute concerning that

history. The legal effect of the negotiations and contract between Harrison County and the United States as declared by the Court of Appeals for the Fifth Circuit is in sharp dispute.

This case originated upon the filing of a complaint (R. 1-33, Vol. I) by the United States against Harrison County, Mississippi, through its Board of Supervisors, the Sheriff of Harrison County, the city of Biloxi and its mayor and the Chief of Police of the City of Biloxi, in two claims, charging First, against all defendants that they had prevented the public from using a sand beach in front of 2000 private property owners which the plaintiff contended, was public property and second, that the City of Biloxi, its Mayor, and Chief of Police had prevented the public from using the beach. The complaint sought to enjoin those governmental units and their officers from interfering with the public's use of the beach.

An amended complaint (R. p. 39-48; Vol. I) was filed again seeking an injunction against governmental units and their officers from interfering with the public's use of the beach, and adding a third claim against Mrs. Lee Dicks Guice, an individual, who had laid claim to exclusive ownership, right, title and interest of a portion of the beach lying in front of and abutting her property. The court was asked to adjudicate Mrs. Guice's claim to the exclusive use of the beach in front of her property to be inconsistent with the interest of the public. (R. p. 53; Vol. I).

On December 26, 1962, the District Court entered an order (R. p. 60-62; Vol. I) determining that the owners of the fast land abutting the beach between Henderson Point and the light house at Biloxi, Mississippi were

indispensable parties to the case and directed the plaintiff to ". . . make defendants here to all of the above parties so found to be indispensable and interested, and to serve upon them an amended complaint." (R. p. 61; Vol. I).

A second amended complaint was filed (R. p. 62-71; Vol. I) in which the successors in office to the original defendants were substituted.

On March 1, 1963, a Second Proposed Seconded Amended Complaint was filed (R. p. 72-90) setting out four claims in which the only new substantive matter was contained in the Fourth Claim charging that Mrs. Dorothy D. Brown was an owner of fast land abutting the beach, and that she was representative of the class of owners of fast land abutting the beach. The plaintiff prayed that she and the class she represented be enjoined from interfering with the public's use of the beach.

In a preliminary pre-trial order (R. p. 293-299; Vol. I) the District Court severed from that class eleven fast land owners on whom the final judgment of the court would be binding. (R. p. 295; Vol. I). Petitioners in this Petition for Writ of Certiorari are among those eleven persons or firms.

The District Court held (R. p. 2632; Vol. V; App. C) in part:

> The private owners who have intervened in this case are found by the Court to be the owners of the fee simple title to this sand beach, together with all littoral rights incident thereto, subject to the U. S. Highway 90 right-of-way easement and the seawall easement and incidental rights in the sand beach to maintain and repair the beach as a support and footing for the protection of said sea-

> wall, with necessary rights of ingress and egress, etc., but for no other purpose.

On appeal the Court of Appeals reversed the District Court. It recognized that the Supreme Court of Mississippi has ". . . primary jurisdiction" in the settlement of disputed land titles; but distinguished the decision of *Harrison County v. Guice*, 244 Miss. 95, 140 So. 2d 838 (1962) on the ground that the United States was not a party to the suit and that the Supreme Court of Mississippi evidently overlooked section 95 of the Constitution of 1890, which reads:

> Lands belonging to, or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals.

On rehearing the Court of Appeals refused to alter its opinion, leaving in effect its decision that the sand beach abutting the fast land is public property.

Reasons for Granting the Writ

I.

The basic question presented is: Whether the century old rule that Federal Courts follow rules of property as established by the highest State Courts where the land is situated may be ignored so as to deprive 2000 owners of their beach front property.

The majority rule followed by the Supreme Court of Mississippi in numerous decisions is that artificial accretions added to fast land by strangers to its title vests in the owner of the fast land.

If permitted to stand the decision of the Fifth Circuit Court of Appeals would establish a new body of Fed-

eral Property law in irreconcilable conflict with the property law of the State of Mississippi.

Certiorari should be granted to avoid the uncertainty, injustice and incalculable mischief which would result from such decision.

When the Supreme Court of Mississippi, the highest court of that state decided *Harrison County v. Guice*, 140 So. 2d 838, it advanced no new or novel concept of property law. There is nothing extraordinary, unusual, unreasonable or unjust about the decision. It followed sound, accepted authority when it said:

> The incalcuable mischiefs[1] that would follow if a riparian or littoral owner is liable to be cut off from access to the water and another owner sandwiched in between him and it whenever the water line is changed are self evident. Tiffany on Real Property, 3rd ed., Chap. 28, Sec. 1219; State v. Gill, 259 Ala. 177, 66 So. 2d 141; 56 Am. Jur., Waters, Secs. 273, 274; Forgeus v. Santa Cruz County, 24 Cal. App. 193, 140 P. 1092; Cf. Rule, 134 A.L.R. 468; Michaelson v. Silver Beach Imp. Ass'n (Mass.) 173 N.E. 2d 273; 65 C.J.S. Navigable Waters § 82, page 177; 56 Am. Jur., Waters, Sec 486, page 899. Any other rule would be manifestly unjust and would "* * * unreasonably interfere with the riparian or littoral proprietor's right of access to and from such waters and the reasonable use thereof as well as of the land subject to tide-water." State ex rel. Rice v. Stewart, 184 Miss. 202, 184 So. 44, 185 So. 247.

[1] The most shattering example of that mischief is contained in the opinion of the Court of Appeals, on rehearing wherein the court directs the District Court to enjoin permanently the landowners from: ". . . hereafter placing any fill, structure, or other obstruction in and upon the sand beach." (R. p. 2673; Vol. VI). The future use of the sand beach in this resort area is thus frozen by a servitude fixed by the Fifth Circuit. Quary: Would not the owner of a motel whose land abutts the beach subject himself to contempt of court if he built a "structure" in the nature of cabana for the use of his patrons?

Fully a year before the Fifth Circuit decided this case, the Supreme Court of Mississippi was again called upon to define the nature of the trust affixed to submerged lands. The area was Deer Island off the coast of Biloxi; the question was the validity of legislation which enabled the City of Biloxi to develop the island through a bridge and park commission by reclaiming some of the bottom lands and selling some of the reclaimed lands to private individuals. Upholding the enabling legislation, the Supreme Court in *Treuting v. Bridge & Dock Commission*, 199 So. 2d 627 said:

> The question is whether the trust of the state, because of its nature and purposes, prevents alienation in fee simple of the submerged lands. The pertinent rules are common law rules. The primary public purpose of the trust was to prevent interference with navigation. Its secondary public purpose was to protect fishing and marine life. **Moreover, there is a private trust associated with the submerged bottoms running in favor of the upland owner whose lands border the line marked by the mean tide.** *Harrison County v. Guice*, 244 Miss. 95, 140 So. 2d 838 (1962) (emphasis added)

In *Treuting* the Supreme Court did not mention Section 95[2] of the Mississippi Constitution of 1890, but cited and reaffirmed *Guice*.

Ten months before the Fifth Circuit decided this case, the Supreme Court of Mississippi had before it in a confirmation suit the effect of an artificial accretion

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[2] "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals." Discussing this section the Fifth Circuit in *U. S. A. v. Harrison County, et al*, said "We assume that this provision was not called to the attention of the Supreme Court of Mississippi, as it is not discussed in the opinion." Since the section is not mentioned in *Treuting*, the same assumption can be made and the validity of a $40,000,000.00 project discussed in *Treuting* is cast in doubt until the Fifth Circuit has had opportunity to pass upon the question.

to fast land, made in this instance by the United States which deposited fill on and next to the fast land while dredging a channel in Biloxi, Mississippi. Holding that the fill attached to the fast land the court in *Moore v. Kuljis* (1967) 207 So. 2d 604, 610 said:

> Analogous to this rule is *Harrison County v. Guice*, 224 Miss. 95, 140 So. 2d 838 (1962) where it was held that land, created by the county by filling in shallow bottom lands on the Gulf of Mexico below original mean high tide, in connection with construction of a beach and seawall, belonged to the owner of the upland in fee simple. The filled area, added to the land of the upland owner by artificial accretion made by a stranger, accrued to the upland owner. Thus the Mississippi Sound, was extended as a street to the water after the area below its terminus was filled in by the Federal Government.

For the second time the Supreme Court of Mississippi reaffirmed *Guice*. Yet these three pronouncements of the Supreme Court of Mississippi concerning questions of property law peculiar to Mississippi are cast in doubt, although they have been carefully considered **by the court[3] and serve as guide to the bench and bar, but for the decision of the Fifth Circuit.**

Petitioners submit that the *Guice* case standing alone furnished a clear rule of property which should have bound the Fifth Circuit. When *Guice* was cited with approval and formed a part of the decision in *Treuting*, with all justices concurring, any doubt attending the soundness of the case entertained by the bench and bar

[3] The opinion in Guice was written by Justice Gillespie, in which Justice Ethridge concurred. When Treuting reached the Supreme Court, Justice Ethridge, who had become its Chief Justice, wrote the opinion and all justice concurred. And in Moore Chief Justice Ethridge wrote the opinion, and all justices concurred except Gillespie, P. J., who took not part.

should have vanished. When in *Moore* all participating Justices found that *Guice* was analagous to the situation presented and applied the principles of *Guice to Moore*, *Guice* became established as the law of the state, without doubt.

While the Fifth Circuit characterized *Guice* as *sub judice*, the Supreme Court of Mississippi over one hundred years before *Guice* in *Steamboat Magnolia v. Marshall*, 39 Miss. 109 set forth the rule of property applicable to this case in the following language:

> In obedience therefore to the laws and comity of nations, it became, at an early period in its history, the doctrine of the common law, that grants of land, by the sovereign power, bordering on tide water, extended only to high water mark; leaving the water and the shore below ordinary high water mark subject to this general use or public easement, for commercial and other purposes as the common highway of all nations.
>
> * * * * *
>
> A more perfect regulation could not be devised. It effectually secures the public interest, guards private interests and promotes the ends of civil society, and the peace and security of individuals, by pursuing the wise maxim of assigning to every thing capable of ownership a legal and determinate owner.
>
> * * * * *
>
> A review of the American decisions will show that these just maxims of the common law founded on the law of nature and of nations and sanctioned by reason as well as unbroken precident in England, for centuries, have not been seriously doubted or contravened in any well-considered case involving the rights of riparian owners in this country.

Petitioners submit that there is no reason to sanction a departure from the laws of Mississippi fixing that clear rule of property. Once the rule of property has been established the Federal Courts are bound to follow that rule even though they may be in disagreement with it.

The decision of the Fifth Circuit conflicts with the decisions of this court including *Edward Hines Yellow Pine Trustees v. Martin*[4] wherein this court said:

> But where the rule is one affecting title to real estate within the state, and has been repeatedly determined by decisions of state courts, so that it is established as the law of the state, there has been no departure from the rule that the Federal courts will follow the decisions of the state courts (citing authority) and this is the rule even though state rule is not approved (citing authority). To avoid the uncertainty and injustice which result from the "discordant element of a substantial right, and which is protected in one set of courts and denied in the other with no superior to decide which is right" (Brine v. Hartford F. Ins. Co., 96 U.S. 627, 24 L. ed. 858), this court has not hesitated where there has been a conflict of decisions between it and the state courts, to overrule its own decisions and to follow the state decisions once it has become evident that they have established a "rule of property" as the settled law of the state (citing authority). We are, therefore, constrained in the present case to accept the view of the state courts as announced by them without inquiring, as an original proposition, into the justice and sufficiency of the rule which we follow.

Being presented with a clear cut rule of property, the Fifth Circuit nevertheless inquired ". . . into the justice and sufficiency of the rule . . ." and refused to

[4] 268 U. S. 458, 468.

follow it. In so doing it cast doubt on the $40,000,000.00 Deer Island project, and upon the title to the foot of Cedar Street in Biloxi, Mississippi, upon which questions all of the participating justices of the Supreme Court of Mississippi looked to *Guice* as the established rule of property. Certiorari should be granted to correct the Fifth Circuit's departure from the decisions of this court and from its own decisions,[5] which have established without fail that on questions of property rights, the decisions of the highest courts of their respective states bind the Federal Courts.

II.

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the Submerged Lands Act, 43 U. S. C. 1301 et seq, and the decisions of this court construing the act.

Using language which clearly expressed its intention, Congress stated:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, . . . and (2) the right and power to manage, administer, lease, develop and use the said lands . . . be and they are . . . vested and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located. 43 U.S.C. 1311.

In equally clear language, Congress defined "lands beneath navigable waters" to mean:

> (3) all filled in, made or reclaimed lands

[5] See: Humble Oil & Refining Co. v. Sun Oil Company (5th Cir; '51) 190 F. 2d 191, citing *Edward Hines Yellow Pine Trustees* and quoting the language of this court above set out.

> which formerly were lands beneath navigable waters, as hereinabove defined. 43 U.S.C. 1301.

It is abundantly clear from the record that prior to the building of the seawall in Harrison County, property owners along the shore of Mississippi sound owned to the water's edge; and that no one disputed the title to beach in front of their property. The seawall and nature removed that beach and it was replaced by the combined action of Harrison County and the United States.

Over two thousand owners of property abutting the shore now have a beach sandwiched between their property and the waters' edge. From the Coast of Washington to Maine, the Submerged Lands Act served as a quitclaim of the Federal Government's interest in lands "beneath navigable water", passing that interest to the States or the persons who on June 5th, 1950 were entitled thereto. Out of the thousands of miles of coast line affected by the Submerged Lands Act, the Fifth Circuit has carved out a twenty four mile strip in Harrison County, Mississippi and has said that the Submerged Lands Act does not apply.

This Court has said:

> The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation" United States v. Midwest Oil Co., 236 U.S. 459, 474, 59 L. ed. 637, 681, 35 Ct. 309: "For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the power of the proprietor therein. Congress may 'deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale' (citing authority). The power over the public land thus en-

> trusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" *Alabama v. Texas*, 347 U.S. 272.

By clear language Congress has directed the courts to look to ". . . laws of the respective states . . ." to determine the ownership of ". . . all filled in, made or reclaimed lands which formerly were lands beneath navigable waters . . .". As we have previously mentioned there is no absence of law on the subject in Mississippi.

For these reasons we submit that this Court should grant Certiorari to correct the decision of the Fifth Circuit.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

TRANSCRIPT OF RECORD
VOL. VI

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 19.....

No. .....

HARRISON COUNTY, MISSISSIPPI, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ARGUMENT AND SUBMISSION.

Extract from the Minutes of March 26, 1968

UNITED STATES OF AMERICA

No. 24853 — versus

HARRISON COUNTY, MISSISSIPPI, ET AL

On this day this cause was called, and after argument by Edmund B. Clark, Esq., Attorney, Department of Justice, for appellant, and James S. Eaton, Esq., Charles R. Galloway, Esq., Jacob D. Guice, Esq., Owen T. Palmer, Jr., Esq., Garner W. Green, Esq., George R. Smith, Sr., Esq., Edward G. Tremmel, Esq., George Estes, Jr., Esq., and Knox White, Esq., for appellees, was submitted to the Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24853

UNITED STATES OF AMERICA,
Appellant,

versus

HARRISON COUNTY, MISSISSIPPI, ET AL,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

---

(August 15, 1968)

Before GEWIN and COLEMAN, Circuit Judges, and HUGHES, District Judge.

COLEMAN, Circuit Judge: The United States brought suit for the enforcement of its contract with Harrison County, Mississippi, dated January 23, 1951. Pursuant to this agreement the federal government contributed $1,133,000 to the construction of a sand beach in the waters of the Mississippi Sound. The County dedicated the beach to the public use. The District Court dismissed the complaint. We reverse and remand, with directions.

The lawsuit began May 17, 1960. The United States as sole plaintiff, filed a complaint against Harrison County, its supervisors and sheriff, and against the City of Biloxi, Mississippi, its mayor, and chief of police. The

case was ultimately tried on a second amended complaint, which had been filed February 20, 1963. In the meantime, by order of the Court *sua sponte*, about 1800 individuals owning land fronting the beaches were brought in as necessary parties defendant. The case came to final decision March 7, 1967, on a record of 2628 pages, including approximately 375 exhibits.

Harrison County is bounded on its entire south side by the waters of the Mississippi Sound, an arm of the Gulf of Mexico. It was formerly a part of the District of Mobile, Spanish West Florida, but was annexed to the Mississippi Territory on May 14, 1812. The Territory became a State on December 10, 1817, and Harrison County, named for the hero of Tippecanoe, was organized February 5, 1841. Since this is a resort area, outstandingly attractive to tourists, this has been the controlling factor in the history, the government, and the economy of the region.

The origins of this litigation go a long way back. For decades, a public road extended east and west along the south side of Harrison County, parallel to and along the sand beaches of Mississippi Sound. In September, 1909, a severe tropical hurricane caused long sections of this beach road to be washed away. It was rebuilt, but only six years later another hurricane inflicted similar damages. It became clear that some form of protection would have to be devised if the road was to be maintained. The result was that in 1924 the Mississippi Legislature passed an Act, Chapter 319, Laws of 1924, approved April 9, 1924, the pertinent parts of which, including the title, are now copied as follows:

> "AN ACT to authorize any county of the state where any part of the land of such county

touches or joins any body of tidewater, to erect sea walls or other structures or devices for the protection of public highways extending along the beach or shore of any such body of tidewater and to issue the bonds of the county therefor and to apply a portion of the gasoline tax collected in such county towards the payment of the interest and principal of such bonds.

"Certain counties may erect sea walls.

"SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That whenever any public road, street or highway shall extend along the beach or shore of any body of tidewater, and such road, street or highway, or any part thereof, shall be exposed to, subject to, or in danger of, damage by water driven against the shore by storms, and is not protected in any sea wall district, the boards of supervisors shall have the power, and it is hereby made their duty, to erect and maintain all necessary sea walls, breakwaters, bulkheads, *sloping beach*, [emphasis added] or other necessary device to protect and preserve such roads, streets and highways, and for that purpose, and for the purpose of constructing or improving such highway, may issue the bonds of the county therefor.

"Boards of supervisors may exercise right of eminent domain.

"Sec. 3. For the purpose of this act, the several boards of supervisors are hereby clothed with the power and authority, and it is made their duty, to exercise the right of eminent domain in order to procure the right of way for such roads, streets, highways, sea walls, breakwaters, bulkheads, *sloping beach* [emphasis added], and such other devices as may be adopted for the protection of such highways, and shall have the power to

> pass all necessary ordinances for the preservation and protection of any such road, sea wall, *sloping beach* [emphasis added] or other device constructed under this act, and the violation of such ordinances shall constitute, and be punished as, a misdemeanor."

Pursuant to this statute, on April 27, 1925, as appears of record in the Minutes of the Board, of which we are entitled to take judicial notice, the Supervisors resolved that an easement to a strip of land running generally parallel with and between the beach road and the waters of the Gulf should be acquired by eminent domain. Omitting unessential details, the notice to the landowners described a strip of land fifty feet in width along the beach between parallel lines of and across all the land between the Biloxi Lighthouse and Henderson Point, "the strip of land lying south of the existing public Beach Road or Public Highway running more or less parallel to the shore line of the Gulf of Mexico, and the north edge of said strip of land being at varying distances from the south line of the said public highway". The improvements to be constructed on said easement were described as "a reinforced concrete step-type wall" extending from the south line of the easement to heights of from eight to eleven feet above mean Gulf Level.

After due publication of notice, no landowner claimed any damages for the taking of the easement.

The Board therefore proceeded with the construction. It was completed in 1928 at a cost of $3,400,000. The people of the entire State helped pay for it. The 1924 Act authorized the application of one-half of the gasoline taxes collected in Harrison County (which otherwise would have gone into the state treasury) to the

retirement of the construction bonds, which were not fully paid out until 1952. So, all the people of Mississippi, for twenty-four years, contributed directly to the cost of the seawall.

In *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962), the Supreme Court of Mississippi held that the 1924 statute authorized the County "to erect and maintain all necessary seawalls, breakwaters, bulkheads, *sloping beach* [emphasis added], or other necessary device to protect and preserve such roads, streets, and highways".

Henritzy v. Harrison County, 180 Miss. 675, 178 So. 322 (1938) held that Chapter 319 of the Laws of 1924 complied with the Mississippi Constitution and that title to this fifty foot seawall right-of-way had vested in Harrison County by virtue of the Mississippi ten year statute of limitation [then Code of 1930, Section 2287]. This included all the elements of the right-of-way ownership as authorized by the statute, including the right to construct sand beaches at any future time.

It is conceded that after the seawall was completed the incessant action of the waves washed away the sand to the south of these artificial barriers. Such beaches as existed south of the seawall disappeared. The land thus formerly occupied went under the water bottoms of the Mississippi Sound and became the property of the State, in trust for the people.

The legal result may best be described by quoting the language of the Supreme Court of Mississippi in *Parks v. Simpson*, 242 Miss. 894, 137 So.2d 136 (1962), as follows:

"This Court, by an unbroken line of decisions over 100 years, has declared that the State 'is the owner of lands in the beds of all its shores, inlets, and adjacent to the islands, over which the tides of the sea ebb and flow, and that it holds title as trustee for the people of the State'. *Giles v. City of Biloxi*, 372 Miss. 65, 112 So.2d 815, 823, 113 So.2d 544; *Xidis v. City of Gulfport*, 221 Miss. 79, 72 So.2d 153; *Crary v. State Highway Commission*, 219 Miss. 284, 68 So.2d 468; *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44, 185 So. 247; *Rouse v. Saucier's Heirs*, 166 Miss. 704, 146 So. 291; *Money v. Wood*, 152 Miss. 17, 118 So. 357; *Martin v. O'Brien*, 34 Miss. 21."

We now come to the events which engendered this litigation.

In 1947, there came another hurricane, apparently more damaging than its known predecessors. It did $18,000,000 in damage to the Gulf Coast, most of it in Harrison County. It undermined and destroyed a considerable portion of the pavement on U. S. Highway 90; it destroyed all the piers along the Harrison County shore, numerous homes, tourist cottages, seafood canneries, cafes, bridges, and similar structures. This included the seawall, no longer protected by sand beaches from the buffeting of the waves.

Something had to be done. The County could not do it; it still owed $900,000 on the original seawall.

As usual, the eyes of the needy turned toward Washington. Congress had enacted Public Law 727, 79th Congress, approved August 13, 1946, 60 Stat. 1056, which provided for federal assistance to construction for the protection of *publicly owned* shores against erosion by

waves and currents. This legislation additionally provided that where a political subdivision had theretofore erected a seawall to prevent erosion by waves and currents to a public highway considered by the chief of engineers sufficiently important to justify protection, then the United States could contribute to the repair and protection of such wall by the building of an artificial beach. The federal contribution was limited to one-third of the original cost of the wall, and specifically could be extended only for "shores of the United States that are owned by States, municipalities, or other political subdivisions". A 1956 amendment to the Act is of no consequence because the transaction now under consideration had been consummated long prior to that time.

The studies required by the Act of Congress, made at the request of Harrison County, together with the recommendations of the Beach Erosion Board, were submitted to Congress for its approval. It was recommended that federal aid be extended "provided the State of Mississippi or local governmental agency: * * * provide all necessary lands, easements, and rights-of-way for accomplishment of the work * * * [and] assure perpetual public ownership of the beach and its administration for public use".

Again, the governing authorities of Harrison County went to the Mississippi Legislature. They secured the passage of Chapter 334 of the Laws of Mississippi of 1948, authorizing Harrison County to borrow money for the purpose of repairing, strengthening, or maintaining seawalls *and to comply with Public Law 727, 79th Congress* [emphasis added].

The preamble to the Act recited that the beach erosion studies of Harrison County, Mississisppi, had been

completed, that federal participation in the proposed improvements, comprising repair of the seawall and the construction of the beach with attendant drainage facilities, to the extent of one-third of the original cost of the wall, had been recommended. The statute further recited that *the State of Mississippi* and Harrison County would be required, among other things, to provide at their own expense all necessary lands, easements, and rights-of-way and to "*assure perpetual public ownership of the beach and its administration for public use only*".

Section 2 of the Act of 1948 gave the Board of Supervisors "full power and authority to *meet* and *do* and *grant* any requests of the United States Beach Erosion Board by and under Public Law 727, 79th Congress", including providing the necessary land, easements, and rights-of-way, as above recited, and "To assume (sic) perpetual ownership of any beach construction and its administration for public use only".

The Act concluded with the following language:

> "That the intent and purpose of this act is to give unto the respective boards of supervisors the full power and authority to carry out all the provisions herein, and to act independently, jointly or severally with the United States government by and under public law 727, 79th Congress".

It would be difficult to conceive of a more positive, complete, thorough, or unlimited grant of authority to comply with the requirements of a federal program. This was not only the solemn legislative enactment of a sovereign state but was, in effect, a grant directly from the owner of the property.

After Mississippi enacted Chapter 334 of the Laws

of 1948, Congress approved the federal grant for the repair of the Harrison County seawalls and the construction of the sand beach, *on bottoms then under water*, Act of June 30, 1948, 62 Stat. 1172.

On December 22, 1950, the Board of Supervisors of Harrison County adopted a resolution perpetually dedicating to the public *as a public beach* that sand beach to be constructed from Biloxi Lighthouse on the east to Henderson Point on the west.

Thereafter, on January 23, 1951, Harrison County executed a contract with the United States, whereby, in return for federal financial assistance in the sum of $1,133,000, the County agreed to prosecute the project *as authorized by Congress*. It agreed to provide at its own expense all necessary lands, easements, and rights-of-way, and agreed to *assure perpetual public use of the beach* and the administration thereof for public use only.

After all these things had been done, *and not until then*, did construction begin. The sand beach became a reality, constructed altogether with public money, one-third of which had been furnished by the United States. The federal funds were made available by the Congress in reliance on the 1948 Act of the Legislature. In turn, these funds were disbursed by the United States in reliance upon the duly authorized acts of the Board of Supervisors of Harrison County, perpetually dedicating the beach to the use of the general public.

Beginning in 1953, and continuing at least until 1963, there were incidents in which members of the general public were forcibly denied the use and enjoyment of the beach, in violation of the foregoing dedication of

December 22, 1950, and contrary to the solemn contract of January 23, 1951.

This chain of events prompted the United States to file suit against Harrison County for the specific performance of the contract as to perpetual public use of the beach. Injunction was sought against any local officials to prevent their interference with the performance of the county obligation.

Harrison County defended on the ground, in addition to one other, that it was under no obligation, by contract or otherwise, to insure that the beach be maintained and administered as a public beach, and that it had no power, statutory or otherwise, to do so. Without repeating what has already been clearly, we hope, set out as to the statutory authority granted Harrison County by the Acts of 1924 and 1948 and the acts of the Supervisors in pursuance thereof we hold that these arguments are wholly devoid of merit. They are accordingly rejected. We repeat that it would be difficult to conceive of a more complete, thorough, unlimited authority than that granted by the State of Mississippi in its Acts of 1924 and 1948. The State, as owner and trustee of the lands for the use of *all the people of Mississippi*, had the power to grant such authority for public use. The dedication was made and the contract was executed. The money was spent and the beach was constructed. The obligation of Harrison County as assumed in its contract with the United States is inescapable and must be enforced.

It is sought, however, to defeat such enforcement by reason of the decision of the Supreme Court of Mississippi rendered in the case of *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962). After the United

States had filed the suit presently *sub judice*, Mrs. Lee Dicks Guice, now deceased, then an owner of land abutting the seawall, brought suit against Harrison County, claiming fee simple title to that portion of the sand beach constructed adjacent to her property. The United States was not a party to the suit. The County denied that Mrs. Guice was the owner of the beach, but asserted that it was erected as a protective device and not for recreation. It denied making or attempting to make it a public beach, denied authorizing or encouraging its use by the public, and denied its authority to do so.

Conceding that the State is the owner of the lands in the beds of its shores over which the tides of the sea ebb and flow, that it holds such title as trustee for the people, and that the State has such title to all such lands below mean high tide, the State Supreme Court nevertheless held that when the sloping beach was constructed Mrs. Guice became the owner of that part adjacent to her lands *by artificial accretion*, subject only to the repaid and maintenance of the seawall and its protecting sand beach.

It was this decision which prompted Harrison County to assert, and caused the District Court to hold, that this seventeen mile beach, constructed at a cost of millions to the United States and to the taxpayers of Mississippi is not to be made available to the use of the general public.

With unfeigned respect for the Supreme Court of Mississippi, we concede its primary jurisdiction in the settlement of disputed land titles. We have no intention of trespassing on that jurisdiction. Our difficulty with *Guice* is that the United States was not a party to the litigation. The decision, therefore, is not *res adjudicata*

as to the rights of the United States. Four conditions are essential to sustain a plea of res adjudicata — (1) identity of things sued for, (2) identity of cause of action, (3) identity of persons and parties to the action, (4) and identity of quality or character in the person against whom the claim is made, *Pray v. Hewitt*, 254 Miss. 20, 179 So.2d 842 (1965). See also, *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed. 2d 186 (1963); *Mallow v. Hinds*, 12 Wheat 193, 25 U.S. 193, 6 L.Ed. 599 (1827); *Harris v. Hardeman*, 14 How. 334, 55 U.S. 333, 14 L.Ed. 444 (1852); *Bank of Richton v. Jones*, 152 Miss. 796, 121 So. 823 (1929); 50 C.J.S., Judgments, Sections 592, 601.

We find ourselves unable to follow *Guice* as a matter of *stare decisis* because the County in that case denied that it had agreed to or was attempting to "operate" a public beach.

Subject only to the rights of repair and maintenance, which had already been surrendered as a result of the 1924 enactment, the obvious effect of the *Guice* decision is to award this beach, free of charge, to the adjoining landowners. By the application of the common law doctrine of artificial accretion the private landowners were denominated the donees of land which unquestionably belonged to the State when the improvements began. We are of the view that under the facts of this case this cannot be squared with Section 95 of the Mississippi Constitution of 1890. That section reads as follows:

> "Lands belonging to, or under the control of the state, shall never be donated *directly* or *indirectly* [emphasis added] to private corporations or individuals."

We assume that this provision was not called to the attention of the Supreme Court of Mississippi, as it is not discussed in the opinion. In any event, the constitutional provision supersedes and abrogates the common law, 15A C.J.S., Common Law, sections 11 and 12.

We thus have no doubt that the State, in obedience to this constitutional mandate, unshackled by the common law, had full authority to enact Chapter 334 of the Laws of 1948, and pursuant thereto the Board of Supervisors had full authority to contract as it did with the United States for the acquisition of public funds and the perpetual dedication of this beach to the use of the general public. The common law doctrine of artificial accretion must yield to the command of the Mississippi Constitution as to the disposition of state owned lands.

The use of the beaches is, of course, subject to reasonable regulations by the State in the exercise of its police powers and such public use must be enjoyed in compliance with all valid laws of the State of Mississippi. For instance, such use cannot unreasonably interfere with the littoral rights of the adjoining landowners. This includes the enjoyment, without unreasonable interference, of access to the water for swimming, bathing, boating, fishing, and other customary aquatic pursuits. See *Trueting v. Bridge and Park Commission of the City of Biloxi*, ... Miss. ....., 199 So.2d 647 (1967).

It necessarily follows that the United States is entitled to have its contract with Harrison County enforced. This can be accomplished by granting appropriate injunctive relief against interference with the rights of the general public to the use of the beach as herein enunciated.

APPENDIX B

UNITED STATE COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1967

No. 24853

D. C. Docket No. CA 2262

UNITED STATES OF AMERICA,
Appellant,

versus

HARRISON COUNTY, MISSISSIPPI, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GEWIN and COLEMAN, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same

is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Harrison County, Mississippi, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 15, 1968

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24853

UNITED STATES OF AMERICA,
Appellant,

versus

HARRISON COUNTY, MISSISSIPPI, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 7, 1969)

Before GEWIN and COLEMAN, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: Our original opinion in this case, dated August 15, 1968, is reported, 399 F.2d 485.

We there held, 399 F.2d at 490, "the obligation of Harrison County as assumed in its contract with the United States is inescapable and must be enforced".

We further held that the littoral rights of those landowners whose lands adjoin and about the sand beach in question were entitled to enjoy access to the water for

swimming, bathing, boating, fishing, and other customary aquatic pursuits.

On the controlling point at issue, we held that the contract between the United States and Harrison County, Mississippi, "perpetually dedicated the beach to the use of the general public" and assuring "perpetual public use of the beach and the administration thereof" was not to be avoided by the application of the common law doctrine of acquisition by artificial accretion since such acquisition under the facts of this case is expressly prohibited by § 95 of the Mississippi Constitution of 1890. This section provides: "Lands belonging to, or under the control of the State, shall never be donated directly or indirectly to private corporations or individuals".

The parties filed Petition for Rehearing En Banc.

Thereafter, to avoid as far as possible any chance of mistake in the disposition of this litigation, affecting, as it does, vast public and private interests, we requested supplemental briefs. These briefs have been filed and fully considered. We are not convinced by anything appearing in the briefs that the original opinion and the result it reached are in error.

We, therefore, adhere to our original opinion.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

In our opinion of August 15, 1968, we reversed the judgment of the District Court and remanded the case for further proceedings, including appropriate injunctive relief. The framing of injunctions is a function which should be and under ordinary circumstances is to be performed by the court of original jurisdiction.

Nevertheless, for clarity in observance of our original opinion, without in any way limiting the action of the District Court as to any and all appropriate relief justified by the pleadings and the proof, we especially point out that the injunction when issued by the District Court should include the following:

1. A permanent mandatory injunction requiring the Board of Supervisors of Harrison County, and their successors in office, faithfully to execute the contract of January 23, 1951, according to its full tenor and purport, without exception or further dereliction. This should expressly include the regular, efficient maintenance of said sand beach, as required by the contract;

2. The landowners, who were made parties to this litigation by order of the District Court, and their successors in title, should be permanently enjoined from in anywise interfering with the free public use of the said beach, subject to any and all valid laws and police regulations of the State of Mississippi and Harrison County. In particular, said landowners, and their successors in title, should be enjoined from hereafter placing any fill, structure, or other obstruction in and upon the sand beach;

3. Declaratory judgment should be entered appropiately defining the *littoral* rights of those owning land abutting the sand beach;

4. Since this litigation originated out of the failure of Harrison County, Mississippi, acting by and through its Board of Supervisors, to observe its contract with the United States, all costs of this litigation should be taxed against Harrison County.

Petition for Rehearing En Banc

Denied.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24853

UNITED STATES OF AMERICA,
Appellant,

versus

HARRISON COUNTY, MISSISSIPPI, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

I, Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages contain a full, true and complete copy of the following papers: Five-volume mimeograph record, argument and submission, opinion of the Court, judgment, and opinion-order denying rehearing and rehearing en banc; in the above cause in this Court as full, true and complete as the originals of the same now remain in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this date.

EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit.
By /s/ ROSALIE AUMENT
Deputy Clerk

DATE: September 17, 1969

UNITED STATES DISTRICT COURT
S. D. MISSISSIPPI, S. D.

Civ. A. No. 2262.

UNITED STATES of America,

Plaintiff,

v.

HARRISON COUNTY, MISSISSIPPI, et al.,

Defendants.

March 8, 1967.

WILILIAM HAROLD COX, Chief Judge.

This suit was instituted by the United States to compel specific performance of a contract with Harrison County, Mississippi with respect to the use of the twenty-six mile long artificially made sand beach abutting the north line of Mississippi Sound along the south line of Harrison County, Mississippi; and for injunctive relief against peace officers who allegedly discriminated against negroes in the use of the sand beach. Between July 1925 and March 1928, Harrison County constructed a seawall on the south most fifteen feet of a fifty foot easement along the south right-of-way line of US Highway 90, a distance of approximately twenty-six miles from the Biloxi Lighthouse westerly to Henderson Point along the Mississippi Sound, to protect that interstate highway and the residential and commercial properties abutting said highway on the north. This area for many years had taken a terrific beating by the sea from several hurri-

canes which did etxensive damage to the highway and nearby properties resulting in the expenditure of millions of dollars for repairs. Harrison county constructed that seawall at an out-of-pocket expenditure of approximately three million four hundred thousand dollars. The highway right-of-way and the seawall easement were both acquired for public use off the south end of lots of private owners who had residences or businesses on the north end of such lots abutting the north right-of-way line of said highway. Those lots extended southerly past the seawall for distances of two or three hundred feet. After the construction of the seawall, the greater part of these lots extending south of the seawall were caused by the seawall to be washed into the sea thereby endangering the seawall and this interstate highway. Harrison County determined that it was unable to shoulder the expense of any such venture alone and sought government financial assistance. The United States had a policy of advancing public funds as a contribution toward necessary expenditures used for the protection of public property, such as the seawall and the interstate US Highway 90.[1]

[1, 2] The Legislature of the State of Mississippi enacted Chapter 334 and Chapter 335, Laws 1948 to authorize Harrison County to borrow funds and to enter into a contract with the United States government for a

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[1] The River & Harbor Act (33 U.S.C.A. § 426e) provides that: "[I]t is declared to be the policy of the United States, subject to the following provisions of Sections 426e-426h of this title to assist in the construction, but not the maintenance, of works for the restoration and protection against erosion, by waves and currents, of the shores of the United States, its Territories and possessions." Paragraph (d), captioned "Shores Other Than Public," provides: "*Shores other than public* will be eligible for Federal assistance if there is benefit such as that arising from public use or from the protection of nearby public property or if the benefits to those shores are incidental to the project, and the Federal contribution to the project shall be adjusted in accordance with the degree of such benefits."

contribution of $1,133,000 as approximately one-third of the estimated cost of such venture. On January 23, 1951 the county entered into a written contract prepared by government counsel for the construction of a three hundred foot wide sand beach to be pumped in by the county from the shallow waters of Mississippi Sound to abut the south footings of the seawall. All of this work was done by the county with its employed labor and with equipment which it was authorized to and did purchase for that purpose at a cost to the county alone of approximately $2,266,000.00. The contract, among other things, obligated the county: "To provide at its own expense all necessary lands, easements and rights-of-way for the venture." The government contends that this sand beach was designed and intended for public use for recreational purposes, as well as for drainage facilities and footings and support of the seawall against ravages of the sea. The United States contributed one million one hundred thirty-three thousand dollars to that venture. On December 22, 1950 the Board of Supervisors of the county, as its managing agency, adopted a resolution which provided that they "do hereby dedicate perpetually to the public as a public beach that sand beach or fill proposed to be pumped into and/or constructed from the seawall, approximately three hundred feet and extending from Henderson Point on the west to Biloxi Lighthouse on the east." The resolution reserved to the county and to the government the right to control and supervise the beach as public property and to make repairs, extensions or improvements thereto with rights of ingress and egress therefor. The United States drafted its own instruments and made its own desired independent title investigation as to the ownership of the title to this three hundred foot wide sand beach upon completion of construction thereof by the county as a stranger to the title to the abutting

lands. There was a difference of opinion among lawyers at the time as to the ownership of such sand beach created by artificial accretion without authority of the owners of abutting lands. The Supreme Court of Mississippi subsequently decided that sand pumped from the shallows of Mississippi Sound to create this fill south of the seawall without participation therein by the owners of the servient estates in these lands belong to these owners as a matter of law under the doctrine of artificial accretion.[2] The United States Engineers and their advisors were once apparently advised that such lands would belong to the State of Mississippi, but later knew before making the contribution thereto that there was serious doubt as to the validity of such legal views. The property owners in the meantime neither did nor said anything to encourage or discourage such venture and were not consulted and did not participate in any of the negotiations between the county and the government for such contribution. Neither the government nor the county ever actually considered or intended that the county would be obliged under its agreement to obtain an easement for recreational purposes over this sand beach area from

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[2] The Supreme Court of Mississippi in Harrison County, Mississippi v. Guice, 244 Miss. 95, 140 So.2d 838 held in a case involving one of the defendants here, that Mrs. Guice became the owner in fee by artificial accretion of the sand beach pumped in from Mississippi Sound on to the south end of her land which extended to mesne high tide with all rights of a littoral owner. There, as here, the county did not acquire any further easement than the fifty foot easement acquired under Chapter 319 Mississippi Laws 1924. It acquired nothing under Chapter 334 Mississippi Laws 1948. The Court held that the county had a right to maintain and repair the seawall and the sand fill south of the seawall as a road and seawall protection structure with ingress and egress over and across said Guice land for said purposes. The south line of the Guice land was fixed as the mesne high tide line of Mississippi Sound as it presently exists. This land was thus burdened with an easement for US Highway 90 plus the seawall plus such easement rights for repairs and maintenance of the seawall and no more. Thus the seawall improvements constructed in 1951 were added burdens authorized by the 1924 statute, "but a considerable portion of what was done in 1951 was outside the fifty foot right-of-way acquired in 1925." That decision applies here and is controlling in this case.

anybody.[3] After the construction of the sand beach with all of the drainage facilities provided thereby, the county invoked the powers of the Board of Health and its assistance to zone this beach area and prohibit the emptying of raw sewage therein for the protection of bathers using the beach. A large part of the entire beach property is owned and operated by hotels and motels and kindred establishments whose guests use such facilities. The Veterans Administration facilities belonging to the United States government own several hundred feet of this beach property and prohibited recreational use of the beach by the individual public, and limited the use thereof only to its patients and personnel.

Through the intervening years, the county at its expense has regularly and periodically dragged and swept and cleaned the sand beach as required by the contract with the government and has maintained and repaired the seawall, and has kept its drainage facilities over the sand beach operating and has exercised full rights of ingress and egress thereto at all times without objection. The owners of these residences and business establishments in the main have paid little attention to the use of the beach in front of their properties until such use was abused by night time misbehavior and their moral sensibilities were offended by such improper use. Theretofore, both white people and colored people had made some limited use of the beach for bathing and picnicking

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[3] The legal effect of this grant of this surface easement is controlled by state law and not federal law. The title to the servient estate rested in the private owners of these beach properties, subject only to the seawall surface easement and the right-of-way of US Highway 90. It must thus be determined under Mississippi law as to whether or not Harrison County, Mississippi as owner of this fifty foot seawall easement and the right over adjacent land to construct the drainage and support system for the seawall could make use of such area for sun bathing, swimming, picnicking and the like by the general public. That is the gist of Wallis v. Pan American Petroleum Corp., et al., 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369.

without objection, but when such permissive use was abused, these owners ordered people of both races off their property. Police protection of their properties was requested by these owners. The City of Biloxi had no part or participation in the construction of this sand beach, but its officials and the sheriff of the county are made parties to this suit with the claim that they connived or conspired with each other to deny negroes a supposed right as individual members of the public to enjoy public recreation facilities on these privately owned lands; and that they discriminated against negroes in so doing. This is not a civil rights suit as government attorneys so correctly stated at the bar. It is basically and fundamentally and primarily a suit to quiet the title to its supposed recreational easement over this sand beach for individual public use; or in the alternative for specific performance to require Harrison County to acquire such easement for such individual use by the general public; and to enjoin these public officials from arresting and charging persons making unauthorized use thereof with the violation of the trespass laws of Mississippi.

[3, 4] The Court has carefully examined and considered this entire record and has studied the briefs of counsel and has made extensive independent research herein. The Court is of the opinion that this three hundred foot wide (north to south) by twenty-six miles long (east to west) sand beach pumped in from the shallow waters of Mississippi Sound nearby without any participation therein by the owners of the abutting properties thereby inured to the respective abutting owners whose properties front on Mississippi Sound in Harrison County, Mississippi. That is the law in this state as announced in the Guice case. There was never any meeting of the minds of the parties representing the United States and

Harrison County that the latter ever assumed any duty or obligation to acquire a recreational surface easement over said sand beach for individual public use.[4] Neither the State of Mississippi nor Harrison County ever had or acquired any right to burden said sand beach with any such easement for recreational use by the general public.[5] The private owners of the abutting lots own that part of said sand beach lying between the east and west line of their properties extended southerly in straight lines into Mississippi Sound, with all littoral rights incident thereto, subject to the right-of-way easement of US Highway 90, and subject further to the fifty foot seawall easement immediately south thereof, and subject to all of the rights vested in and required by said seawall construction, as such easement rights were delineated and defined in Henritzy v. Harrison County, 180 Miss. 675, 178 So. 322; and all other public rights now being exercised by Harrison County in furtherance of the construction of drainage structures, supports and footings over and under said sand beach which were devised and constructed and are maintained to protect said seawall and the Interstate Highway 90 North thereof. The

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[4] In Edwards Hotel Company v. Chambers, 141 Miss. 487, 106 So. 763, the Court dismissed a complaint for specific performance of a lease contract embracing a well described area in the basement of a twelve story building under construction. Blue prints were shown the lessee and the lease provided that the premisese were "taken after examination and without any representation of any kind on the part of the landlord or its agent." The building when completed had the area cluttered with pipes which made it unacceptable for lessee's use. The Court said that the minds of the parties did not meet; that each party to the contract had in mind and intended certain things unknown to the other. The complaint was dismissed.

[5] Significantly, the fifty foot easement for the seawall was actually acquired by adverse possession. "The south 15 feet of the right of way has been occupied by the sea wall proper, and this within itself, under the evidence as reflected by the agreed statement of facts, would clearly extend the claim and occupancy to the calls of the northern boundary of the 50-foot right of way as color of title." Henritzy v. Harrison County, 180 Miss. 675, 178 So. 322. The county never sought or acquired any recreational easement over this sand beach.

Court will presently make certain other necessary and more specific Finding of Facts and Conclusions of Law.

FINDING OF FACTS

(1) The United States instituted this suit against the parties named in the second amended complaint in this case, but approximately eighteen hundred property owners and approximately four hundred mortgagees, or holders of contractual liens on the properties of such owners were permitted to and have intervened herein and claimed their title annd liens to their respective properties in this sand beach in suit. The Court thus finds that it has before it in this case all of the necessary parties in interest for a full adjudication of the subject matter of this case as a land suit.

(2) This seawall was constructed with county funds in 1925 to 1928 at a cost to Harrison County of three million four hundred thousand dollars to protect US Highway 90 and the properties abutting Mississippi Sound from the ravages of the sea on the occasion of frequent high tide and several devastating tornadoes which had struck the area many times and inflicted very heavy and expensive damage to this most valuable and highest priced properties in the entire county. This seawall is approximately twenty-six miles long, extending along Mississippi Sound from the Lighthouse in Biloxi to Henderson Point. The seawall was constructed on the south fifteen feet of a fifty foot easement acquired from the private owners of the land, and lay immediately south of the US Highway 90 right-of-way. This seawall was constructed generally between eighty and two hundred feet north of the south line of such privately owned properties, which south line of the privately owned properties was the mesne high tide line of the waters of Mississippi Sound.

[5] (3) Prior to the construction of the seawall, the erosion of the shore line was natural, slow and imperceptible, but subsequently to the construction of the seawall, the erosion was rapid and unnatural and was caused by the existence and location of the seawall. At some points the natural sand beach eroded away to the south line of the seawall, but at other points most or a large part of the sand beach remained; but the general result of the erosion was that the waters of Mississippi Sound did extensive damage to the seawall and US Highway 90, particularly during storms and periods of high tide. The authorities decided that something had to be done and done quickly at very high cost to shore up and protect this seawall as a protection device to such upland improvements. Federal assistance was sought in the form of the contribution of a substantial part of the cost of such protection device. It was decided that footings or abutments of riprap might be constructed, or that a sand beach could be pumped in from the shallow waters of the Sound and beautify and improve the area while operating *primarily* as a device for the protection of the seawall and interstate highway. The United States Engineers erroneously assumed and concluded on their own independent investigation of the law, that this sand beach would ipso facto become the property of the State of Mississippi as it was pumped in place on such beach. But for many months prior to the contract between the parties, dated January 23, 1951, such federal agencies learned and knew that there was a difference of opinion among informed lawyers on that question. There was thus never a meeting of the minds of the parties to that contract that it should ever be or become the duty or obligation of Harrison County to acquire from anybody any recreational surface easement for individual enjoyment by the public over that man made sand beach. The

Legislature of the State of Mississippi in enacting Chapter 334 and Chapter 335 Mississippi Laws 1948 expressly declined to authorize the county to "[*a*]*ssure* perpetual public ownership of the beach" but did grant it the authority "[t]o *assume* perpetual ownership of any beach construction [etc.]" No funds were provided or authorized by the Legislature to be provided for the county to acquire any recreational easement from the private owners of that sand beach; and the United States Engineers and their representatives at all times had actual knowledge of that fact. The United States Engineers were vested with the authority to determine when Harrison County had complied with the requirements for United States financial participation in the construction of that sand beach; and thus with full knowledge of the facts decided that Harrison County had fully complied with such requirements and expectations of the United States, thereupon dispersed one million one hundred thirty-three thousand dollars to the county as its one-third participation in that venture *for the protection of public property.* The record in this case shows and the Court finds that it would require not less than one million five hundred thousand dollars to acquire at this time a recreational easement over this sand beach for individual public enjoyment. Such a venture and outlay was never in the minds of these contracting parties. The county never had, or acquired legislative authority for any such outlay of public funds for such purpose. The acts of the parties at the time and under the circumstances serves to demonstrate as their contemporaneous construction of the contract documents that no such recreational easement was contemplated, or expected by either party, and certainly not at such an expenditure. A very large part of this federal grant was used to repair the seawall itself. It

must be noted that specific performance is not a matter of right but of sound legal discretion, and will not be decreed, unless the contract is just and fair in all of its parts. Clement v. Reid, (1848), 9 Smedes & M. (17 Miss.) 535; Daniel v. Frazer, (1866), 40 Miss. 507; Aston v. Robinson, (1873), 49 Miss. 348; Yazoo & M. V. R. Co. v. Southern Ry. Co. in Mississippi, (1904), 83 Miss. 746, 36 So. 74; Everett v. Hubbard, (1946), 199 Miss. 857, 25 So.2d 768.

[6] (4) On December 22, 1950, the Board of Supervisors, as the managing business agency of Harrison County, adopted the resolution dedicating this entire sand beach to the public as a public beach. The county did not own the title to that sand beach as the instrument assumed, but the county did not undertake to dedicate the beach for individual public enjoyment of recreational facilities and did not warrant or guarantee the ownership of such land. The dedication as an instrument of conveyance merely quitclaimed and released such rights and interests as the county may have had in the property for public use.[6] This instrument was prepared by or on behalf of the United States and does not purport to show that this property was to be used by any individual members of the public for recreational purposes. The county never had any power or authority to borrow any money to buy, or to take by any eminent domain proceeding any property from anybody as a recreational facility for the

[6] The resolution as a word of conveyance dedicated this entire sand beach to the public without any statutory words of warranty. Section 845 Mississippi Code 1942 provides: "A conveyance without any warranty shall operate to transfer the title and possession of the grantor as a quitclaim and release." Section 846 Mississippi Code 1942 provides: "A conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed."

general public, or any individual member of the public.[7]

(5) The words "public use" appearing in the contract documents in suit were intended to mean and did mean a use by public authorities of the beach in connection with the seawall as a device designed and intended basically, and primarily for the purpose of protecting the seawall and interstate highway, and upland installation and improvements from damage by high seas. Significantly, the resolution of dedication was never published and the public never had any notice or knowledge thereof. The property owners never knew of the existence of that resolution of December 22, 1950, and never participated in any negotiations between the county and the government for the latter's contribution to that venture. The provision in the contract in suit, dated January 23, 1951, providing that the county would "provide at its own expense all necessary lands, easements and rights-of-way" related and was intended to refer only to construction easements and rights necessary to the construction of such facility and not to any easement to entitle any individual member of the general public to use the sand beach for his recreation as a matter of right after the

[7] Chapter 334 Mississippi Laws 1948 and Chapter 335 Mississippi Laws 1948 authorized Harrison County to borrow money to repair, strengthen and maintain road protection structures and seawalls and to comply with Public Law No. 727 of the 79th Congress, 60 Stat. 1056, to induce the United States to provide federal aid of approximately one-third of the cost of such venture estimated at three million seven hundred fifty thousand dollars with a participation by the United States of approximately one million one hundred thirty-three thousand dollars. These acts ambiguously authorized the county: "To assume perpetual ownership of any beach construction and its administration for public use only." The United States says that such use was intended for picnics, sun bathing, fishing, etc. While the defendants contend that the public beach was designed and intended primarily as a protection to the seawall and as a drainage facility in furtherance thereof and not as a recreational facility. Nothing in the title or body of either act, expressly or by inference, provides that this sand beach was in tended as a recreational facility in whole, or in part. The country never acquired any land for that purpose, but did acquire and has used it for the public purpose of protecting the seawall and the US Highway 90 immediately to the north.

beach was created. There is nothing in this record to show by a preponderance of the evidence that this county ever intended, or undertook to obligate itself to acquire at its expense an additional servitude on the land of such private owners so as to enable any individual member of the general public to use that sand beach as a matter of right for his pleasure. No contract documents in suit lead this Court to such conclusion as contended for by the United States, but all of the facts and reasonable inferences convince this Court to the contrary.

[7] (6) The record in this case shows that many of these owners from time to time had run members of both races off their breach property. Some individuals abused the privilege permissively granting some people of both races to use the beach, until that privilege was abused by acts which offended the moral sensibilities of these owners. These property owners thereupon instructed peace officers to arrest individuals using such properties without their knowledge or consent as trespassers. The defendant sheriff's term of office expired, and he has since died and his successor (McDonnell) has not made any such arrests during his term of office. No official of the City of Biloxi or Harrison County has discriminated against any person in the administration of the law on account of race, but the peace officers have performed their duty impartially in the administration of the trespass laws of the State of Mississippi with respect to the property in suit.

(7) The county of Harrison and its supervisors have fully complied with all requirements and performed all duties and obligations to the United States under the contract documents in suit; and the second amended complaint of the plaintiff in suit is without merit and should

be finally dismissed, but without the assessment of cost.

(8) No individual member of the public has any right to use this sand beach for any purpose without the permission of the private owners. The private owners who have intervened in this case are found by the Court to be the owners of the fee simple title to this sand beach, together with all littoral rights incident thereto, subject to the US Highway 90 right-of-way easement and the seawall easement and incidental rights in the sand beach to maintain and repair the beach as a support and footing for the protection of said seawall, with necessary rights of ingress and egress, etc., but for no other purpose.

CONCLUSIONS OF LAW

(1) This Court has full jurisdiction of this suit under 28 U.S.C.A. § 1345. All necessary parties not made defendants in this complaint were permitted to intervene, and are before the Court in this case.

[8-11] (2) There was an established public policy of the United States to contribute financially in any venture designed and intended for the protection of public property. The Congress of the United States authorized the expenditure in this case of one million one hundred thirty-three thousand dollars by the United States as a one-third contribution toward the total cost thereof which Harrison County assumed for the public purpose of protecting this seawall against further erosion, so as to enable that seawall to protect Interstate Highway 90 and upland improvements and installations. This sand beach as it was put in place by Harrison County without any participation of the abutting owners of the land, thereby became vested in such owners of the land lying between the east and west lines of the respective properties extended southerly to the mesne high tide line of Missis-

sippi Sound, under the doctrine of "artificial" accretion; together with all littoral rights incident to the ownership of said land, subject to the US Highway 90 right-of-way easement across said land and subject to the seawall easement across said land, as such easement was defined in Henritzy v. Harrison County, supra, as such indeterminate easement was used after the construction of said sand beach. The seawall easement did not specifically describe its boundaries, but it was actually acquired in part by adverse possession and in part by expropriation. The use of such an easement defines its powers and boundary which may not be changed, unless authorized by the instrument under which it was acquired or by agreement of the parties.[8] An added servitude may not be unilaterally added to an easement.[9]

[12, 13] Mutuality is essential to the validity of any enforceable contract. The minds of the parties to the contract documents in suit never met on any idea or suggestion as contended for by the United States that Harrison County ever obligated itself to furnish at its expense a recreational easement over the land of these owners, consisting of this sand beach as an additional servitude

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[8] Capital Electric Power Association v. Hinson, 84 So.2d 409, 412. The Court had before it in that case a right-of-way easement with an indeterminate boundary which the Court said was established by the use made of the area by the parties as their construction of the instrument and that when once thus established that its boundaries could not be enlarged or expanded without the consent of the servient owner of the land unless authorized by the easement agreement. To same effect is Hamilton v. Transcontinental Gas Pipeline Corp., 236 Miss. 429, 110 So.2d 612; Thompson on Real Property, Vol. 2, § 1581, page 188-189; 28 C.J.S. Easement § 84, page 763.

[9] The right of a sovereign who has acquired surface easement rights through eminent domain must have those rights strictly construed. The holder of easement rights in property may not enlarge upon such rights by the added burden of additional servitude. Such cases are collated in Ball v. American Telephone & Telegraph Co., 227 Miss. 218, 86 So.2d 42. It was said that a telephone company could not lease to a telegraph company the right to string an additional wire on telephone poles for telegraph purposes without constituting an additional servitude on the servient estate.

on said land. Nothing was further from the minds of the parties, or the intention of this county to assume any such duty or obligation. It simply did not do so under the facts and circumstances in this case.[10] The county has taken this large sum of money from the United States and has used every cent of it, together with more than twice that amount of its own money in constructing this sand beach, and in repairing and reconstructing parts of this seawall so as to make it an effective protection device as all parties intended.[11] This entire project with its drainage facilities and footings and abutments as contained in this sand beach were constructed and have been maintained at all times and are maintained now as public improvements perpetually dedicated to the public use and benefit. This whole controversy stems from the original concept of this case as being a civil rights matter, which it is not; but this case involves primarily the question of the existence vel non of a recreational easement over this sand beach. No such easement exists; but the next question is as to whether or not the county obligated itself in any manner by any

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[10] It should be noted from Footnote 4 that the parties there had a very clear and positive and well written lease which was not ambiguous, but the Court nevertheless in that case of Edwards Hotel Co. v. Chambers, said that the minds of the parties did not meet in that case and the lease was held void and unenforceable in its entirety. The contract documents in suit are surely not void but have been very effective to accomplish the intended purpose of both parties in this case and nothing more can be required by another agency of the government not familiar with the facts and circumstances at the time.

[11] The River & Harbor Act (Footnote 1) provides that the government had a policy of contributing substantial funds to a venture of this kind which was primarily intended for the protection of public property, even though it incidentally benefited and improved private property. The act does not condition a contribution upon the entire project or venture being subjected to public use. The United States benefited immeasurably from its contribution to this venture by the added protection afforded its Interstate Highway 90. The parties to the contract documents were not disappointed, or surprised, or short-changed, or deceived by anything done by anybody. Actually, many of the property owners never received anything for the taking of the original seawall easement, which was ultimately acquired by adverse possession, as the *Henritzy* case shows in Footnote 5.

contract document in suit to furnish at its expense any such recreational easement over this twenty-six mile sand beach at any place. The positive and undisputed evidence and fair inferences from such evidence proves to the satisfaction of this Court that Harrison County did not so obligate itself. It is familiar learning of universal acceptation that the holder of an easement by his unilateral action cannot acquire the right to impose additional burdens or servitudes upon the servient estate by making any unauthorized use of the land, or by abusing or enlarging upon privileges expressly granted thereasto. In short, this is a land suit which must be decided according to the laws of the State of Mississippi. That is the teaching of the latest case from the highest court of the United States in this situation.

[14] (3) The resolution of dedication of this sand beach by the county is not a nudum pactum, but the word "dedicate" as a word of conveyance, without statutory words of warranty, operates only as a quit-claim or release, and not a guarantee of anything under sections 845 and 846 Mississippi Code 1942. The resolution by its own terms thus did not enlarge, or increase the county's legal obligation to do more than it has already done, and is continuing to do in the performance of this contract. The record in this case shows that this county is now continuing to grade and sweep and refill and repair and maintain this seawall, and this sand beach as abutments at its expense at a monthly outlay of many thousand dollars. It is perpetually caring for and maintaining the beach as an abutment of the seawall and for the protection of the seawall and upland properties as it agreed to do for the general public.

[15] It is conclusively assumed as a matter of law that the United States incorporated in each of the con-

tract documents which it drafted everything which it intended that the county should agree to do as a prerequisite to its financial contribution to this venture. There is actually no real ambiguity in these documents, but such documents do not require, or exact of the county that which the United States claims in this case. The denial of the existence of any recreational easement over this sand beach is not a cloud on the rights of the parties under the express provisions of the easements.

(4) There is not any substantial evidence before the Court to support any charge to the effect that any of these people who were arrested were at the time exercising any right created and vested in them by Congress to deprive these officials of the right to arrest, charge and try them for such a state offense. City of Greenwood v. Peacock, 384 U.S. 808, 86 S.Ct. 1800, 16 L.Ed.2d 944. There is likewise no substantial testimony or fairly deducible inferences anywhere to be found in this record to support a suggestion that these officials on any occasion were preferring trumped up charges under any invalid law simply to deprive any colored people of their constitutional rights such as is dealt with in Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22. Cf. Hatfield v. State of Mississippi (5CA), 363 F.2d 869. The plaintiff has not proved its claim against any of the public agencies, or individuals by a preponderance of the evidence. The claim of the plaintiff is thus without merit and should be dismissed with prejudice without the assessment of cost.

(5) No private individual has any private right of any kind in this sand beach because there exists no recreational easement thereon. All pending objections to evidence and testimony will be overruled. The Court will prepare and enter the judgment.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1004

A. C. SUHREN, LYDIA COOK SUHREN, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 16-28, and, on rehearing, 29-34, are reported at 399 F.2d 485 and 414 F.2d 784, respectively.

JURISDICTION

The final judgment of the court of appeals was entered on August 7, 1969. On October 24, 1969, Mr. Justice Black entered an order extending the

time for filing a petition to January 3, 1970. The petition was filed on December 29, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States, which had provided federal financial and technical assistance in filling submerged land under Mississippi Sound and constructing a beach to protect a seawall pursuant to a contract with Harrison County, Mississippi, was entitled to specific enforcement of the county's agreement in the contract to assure perpetual public use of the beach.

2. Whether enforcement of the contract is inconsistent with the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*

STATEMENT

This suit was brought by the United States to enforce its contract with Harrison County, Mississippi, wherein the County, in return for a federal contribution of $1,333,000 and technical assistance in the repair of hurricane damage to the 17-mile seawall along Mississippi Sound and construction of a sand beach as further protection, agreed "to provide at its own expense all necessary lands, easements, and rights-of-way, and agreed to assure perpetual public use of the beach and the administration thereof for public use only" (Pet. App. 24). The factual and statutory background of this contract, which was

executed in 1951, is set forth in detail in the opinion of court of appeals (Pet. App. 17-24). A series of hurricanes, culminating in a hurricane of 1947, caused such serious damage to the seawall along the Sound that the financial resources of Harrison County were insufficient to pay for the required repairs, and federal assistance was sought. At that time such assistance was available only for publicly-owned shores (Pet. App. 22). Accordingly, appropriate legislation was enacted by the State of Mississippi and by Harrison County to enable the latter to qualify for federal assistance (Pet. App. 21-24). This included a resolution of the Board of Supervisors of Harrison County in 1950 "perpetually dedicating to the public as a public beach" the area here in question, which was to be constructed with the requested federal aid (Pet. App. 24). Construction of the beach pursuant to the federal contract was completed in 1951.

Thereafter, the federal government became aware of a series of "incidents in which members of the general public were forcibly denied the use and enjoyment of the beach," in violation of the County's dedication of the beach and contrary to the 1951 contract with the United States (Pet. App. 24).[1] The United States instituted this suit in 1960 to enforce the provision of its contract requiring maintenance of the beach as a public beach. The district court (W.

[1] The record discloses that the "incidents" constituted a systematic exclusion of Negroes from the beach. Convictions of a group of 41 such Negroes for trespass were summarily reversed by this Court in 1966. *Mason et al.* v. *City of Biloxi*, 385 U.S. 370.

Harold Cox, J.) denied relief, primarily on the ground that such relief was inconsistent with the rights of adjacent landowners under local property law as announced by the Supreme Court of Mississippi in *Harrison County, Mississippi* v. *Guice*, 244 Miss. 95, 140 So. 2d 838, a suit which had been brought by a defendant in the present case while the latter was pending in the district court.

The court of appeals reversed the judgment of the district court, holding that the United States was entitled to enforce the County's agreement to preserve and maintain the filled lands as a public beach. The court held that the *Guice* decision—in which the State court had held that the adjacent landowners became the owners of the beach constructed entirely from public funds—was not controlling in the present case because the United States was not a party in the State litigation and the County in that case had denied that it had agreed to maintain a public beach (Pet. App. 26-27). The court also noted that the decision in *Guice* was inconsistent with Section 95 of the Mississippi Constitution, which provides that "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals" (Pet. App. 27). The court concluded (Pet. App. 28):

> We thus have no doubt that the State, in obedience to this constitutional mandate, unshackled by the common law, had full authority to enact Chapter 334 of the Laws of 1948, and pursuant thereto the Board of Supervisors had full authority to contract as it did with the United

> States for the acquisition of public funds and the perpetual dedication of this beach to the use of the general public. * * *

The court of appeals adhered to its decision on the petition for rehearing *en banc*, adding that (Pet. App. 33):

> The landowners, who were made parties to this litigation by order of the District Court, and their successors in title, should be permanently enjoined from in anywise interfering with the free public use of the said beach, subject to any and all valid laws and police regulations of the State of Mississippi and Harrison County. * * *

ARGUMENT

1. The first question framed by petitioners as to the intrusion of this decision into an area of local property law is simply not in this case. Petitioners ignore the fact that there is a valid contract between the United States and Harrison County, authorized by a statute of the State of Mississippi, plus a dedication to the public of the beach constructed under that contract, all consummated while the area in question was beneath the waters of Mississippi Sound. At that time, title to the area was clearly in the State, in trust for the public and not for the sole benefit of these upland owners. *Money* v. *Wood*, 152 Miss. 17, 118 So. 357; *Xidis* v. *City of Gulfport*, 221 Miss. 79, 72 So. 2d 153; *Harrison County, Mississippi* v. *Guice*, 244 Miss. 95, 140 So. 2d 838. A State may constitutionally dispose of such land for a public or non-public purpose, *Port of Seattle* v. *Oregon & W.*

R.R., 255 U.S. 56, but Mississippi limits the purposes to public ones. *Xidis* v. *City of Gulfport*, *supra*. It can hardly be questioned that the construction of the beach under the relevant statutes, federal and State, the dedication, and finally the contract, were entirely for a public purpose. These factors as to dedication of the fill to public use and the County's obligation under the contract were not resolved by the Supreme Court of Mississippi in *Harrison County, Mississippi* v. *Guice*, *supra*, relied on by petitioners (Pet. App. 5-11). Accordingly, the court of appeals correctly refused to accept petitioners' argument as to the effect of *Guice* as *stare decisis* in this case.

2. Nothing in the court of appeals' decision is in conflict with the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* It has never been questioned that land under inland navigable waters within the State of Mississippi belongs to the State, *United States* v. *California*, 332 U.S. 19, 30-31, and Mississippi Sound is within this category, *Louisiana* v. *Mississippi*, 202 U.S. 1, 48. The Submerged Lands Act did not purport to change this rule. As Senator Cordon, the floor manager of the bill, explained (99 Cong. Rec. 2693), the Act confirmed title as to inland waters, such as Mississippi Sound, and released title as to the territorial sea, *i.e.*, out to three miles beyond the coastline in the case of Mississippi; the latter is not here involved.

It is clear that, under the Act, neither the State, the County, nor the upland owners obtained anything with respect to the submerged lands under inland waters that they did not already have. By public

enactments and declaration, as well as by the contract, the State-owned submerged lands in this case were dedicated to the public use as a public beach. There is no way to construe the Act as preventing the United States from obtaining judicial enforcement of its valid contract.

It also should be noted that Section 5 of the Act, 43 U.S.C. 1313, specifically excepted any lands filled by the United States for its own use. The land was filled with the aid of the United States and money from the federal treasury, and the use by the public required in the contract is arguably a use of the United States. The courts have frequently recognized that the United States may accomplish its public purpose by using its own agents, in whole or in part, or by cooperative arrangement with public or private interests, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26; *United States* v. *First Pyramid Life Insurance Co. of America*, 382 F.2d 804 (C.A. 8); *United States* v. *Pleasure Drive. & Park Dist. of Peoria, Ill.*, 314 F.2d 825 (C.A. 7); *United States* v. *Board of Trustees*, 343 F.2d 149 (C.A. 4).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1004

A. C. SUHREN, LYDIA COOK SUHREN, ET AL., Petitioners

versus

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

LANDOWNERS' RESPONSE

It would be a great miscarriage of justice to over 2000 property owners for certiorari to be denied upon the assertion[1] on the part of government that this case is controlled by *Money v. Wood*, 152 Miss. 17, 188 So. 357, or *Xidis v. City of Gulfport*, 221 Miss. 79, 72 So. 2d 153.

Money held that Section 81[2] of the Mississippi Con-

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[1] In its opinion the Fifth Circuit quoted a short excerpt from *Parks v. Simpson*, 242 Miss. 894, 137 So. 2d 136. In that excerpt *Money* and *Xidis* were cited. There is no other reference to those cases in the opinion in chief or on rehearing.

[2] Section 91 The Legislature shall never authorizes the permanent obstruction of any of the navigable waters of the state, but may pro-

(Continued)

stitution of 189 was adopted ". . . for the purpose of aligning this state with that line of authorities which hold that the state cannot convey in fee such rights to private owners for private purposes."

Thirty-nine years after *Money*, all nine justices of the Supreme Court of Mississippi held that Section 81 of the Mississippi Constitution of 1890 had ". . . nothing to do with the alienation of mud flats and waters not suitable for navigation in fact, or the sale of submerged lands." *Treuting v. Park Commission*, 199 So. 2d 627. Distinguishing *Money v. Wood, supra*, the Court in *Treuting* said:

> (Money) held that a patent from the land commissioner to private persons of submerged lands around Deer Island, for the purpose of erecting a hotel on an artificial island, was void, because it deprived the owners of the west end of the island of their riparian and littoral rights, and was a sale to a person for purely private business. The indication therein that section 81 of the Constitution prohibited the sale of submerged land was **unnecessary to decision of that case.** In short, **the trust character of the state's title and ownership is not constitutional but common-law doctrine.** (emphasis added)

The subject case deals with mud flats and shallow water, and has nothing whatever to do with navigation. Therefore, *Money* is clearly not applicable.

The same can be said of *Xidis*. The South margin of Xidis' property was not the Mississippi Sound, but was

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vide for the removal of such obstructions as now exist, whenever the public welfare demands. This section shall not prevent the construction, under proper authority, of draw bridges for railroads, or other roads, nor the construction of booms and chutes for logs in such manner as to prevent the safe passage of vessels, or logs, under regulations to be provided by law.

the North margin of U. S. Highway 90. While he did not own to the water's edge, he claimed that the harbor planned by the City of Gulfport would interfere with rights which he had enjoyed ". . . such as access to the water, boating, bathing, fishing, crabbing, floundering, shrimping, and the view of the sea and natural breezes from the sea. . . ." The court assumed without deciding that he had those rights, but went on to hold that the ". . . improvements here complained of were improvements for the further development of the Port of Gulfport and in aid of navigation, and do not contravene Section 81 of the Mississippi Constitution. . . ." Therefore, the right of Xidis to engage in boating or to bathe, fish, crab, flounder or shrimp, had to yield to the City's paramount right to improve navigation by expanding its harbor.

Finally, we think it is extremely significant that in its response the government has failed to come to grips with *Treuting* and *Moore v. Kuljis*, 207 So. 2d 604, both of which were discussed in our petition for writ of certiorari. While those decisions anti-date the decision of the Fifth Circuit in the subject litigation, they are the most recent expressions of the Supreme Court of Mississippi on the subject of submerged tide lands and artificial accretions. They represent the considered judgment of all of the participating justices of that court.[3]

The Fifth Circuit, which is enjoined by the decisions of this court to follow the property law of the various

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[3] We touched on this subject in our petition, but the full significance of that participation is not apparent. The Supreme Court of Mississippi consists of nine justices, which sits in panels of five with either the Chief Justice or the next in seniority, the presiding justice moderating. In an important case, all nine justices may be called on to express their opinion or concurrence. All justices concurred in *Treuting;* eight concurred in the result in *Moore.* Presiding Justice Gillespie took no part in the latter.

states, has chosen to lead rather than follow. Its course through the property law of Mississippi concerning the shallow waters of the Mississippi Sound was clearly charted by *Guice*, *Treuting* and *Moore*. The Fifth Circuit overruled *Guice*, not because of *Money* or *Xidis*, but because the Fifth Circuit did not agree with the Supreme Court of Mississippi. Now the Solicitor General cites cases to this court dealing with navigation which have no bearing on the shallow waters of the Sound. This is a prime example of ". . . the discordant element of a substantial right . . ." about which this court spoke in *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 463.

CONCLUSION

For the foregoing reasons, Petitioners suggest that a writ of certiorari should be granted.

Respectfully submitted,

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JACOB GUICE,
GEORGE E. MORSE,
Attorneys for Petitioners.

CERTIFICATE

I, George E. Morse, one of counsel for the petitioners in the foregoing brief, hereby certify that three true copies of the said Response were this day mailed, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General, Washington, D. C.

This _____day of February, 1970.